

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 96-212-W -- ORDER NO. 96-881  
DECEMBER 31, 1996

IN RE: Upstate Heater Utilities, Inc. - ) ORDER  
Application for a transfer of its ) DENYING APPROVAL  
water utility to South Carolina Water ) OF TRANSFER AND  
and Sewer, L.L.C. ) DENYING ISSUANCE OF  
 ) CERTIFICATE OF  
 ) PUBLIC INTEREST

This matter comes before the Public Service Commission of South Carolina (the "Commission") on the Application filed by Upstate Heater Utilities, Inc. ("Upstate") for approval of the Asset Purchase Agreement between it and South Carolina Water and Sewer, L.L.C. ("SCWS"), and the Application for a Certificate of Public Convenience and Necessity to operate the system filed by SCWS. The Applications were filed pursuant to S.C. Code Reg. 103-704 (1976).

By letter, the Commission's Executive Director instructed both companies to publish a prepared Notice of Filing, once, in newspapers of general circulation in the area affected by the Applications. The Executive Director also directed Upstate to furnish a copy of its Notice of Filing to each customer. Both companies complied with the instructions of the Executive Director and supplied Affidavits of Publication and Certificates of Service as proof of compliance. The purpose of the Notices of Filing were to inform interested persons of the Applications and of the manner

and time in which to file the appropriate pleadings for participation in the proceeding. Petitions to Intervene were filed by Chester G. Kapp ("Mr. Kapp"), Stanley Vitcavich ("Mr. Vitcavich"), Sandy Springs Water Company, Inc. ("Sandy Springs"), Hammond Water and Sewer Co., Inc. ("Hammond"), Duke Power Company ("Duke"), Starr-Iva Water and Sewer Company ("Starr-Iva"), West Anderson Water Co., Inc. ("West Anderson"), and Broadway Water and Sewerage District ("Broadway"). The Consumer Advocate for the State of South Carolina ("the Consumer Advocate") filed a Petition to Intervene Out of Time, which was granted.

On December 9, 1996, the Commission held a public night hearing at the old Anderson County Courthouse in Anderson, South Carolina. The purpose of the night hearing was to allow customers of Upstate to present their views to the Commission regarding the Applications.

On December 12, 1996, at 10:30 a.m., the Commission convened a public hearing in the Commission's hearing room at 111 Doctors Circle in Columbia, South Carolina. The Honorable Guy Butler, Chairman, presided. Upstate was represented by Darra W. Cothran, Esquire; SCWS was represented Francis P. Mood, Esquire; Chester Kapp and Stanley Vitcavich appeared pro se; Hammond was represented by James S. Eakes, Esquire; Duke was represented by Mary Lynne Grigg, Esquire, and Richard Whitt, Esquire; the Consumer Advocate was represented by Elliott F. Elam, Esquire; and the Commission Staff was represented by F. David Butler, General Counsel. Officials of Sandy Springs and West Anderson were present, but were not represented by counsel. Neither Starr-Iva, nor Broadway

appeared at the hearing.

In support of its Application, Upstate presented the direct and rebuttal testimony of Jerry H. Tweed, Director of Environmental and Regulatory Affairs for Heater Utilities, Inc. In support of its Application for a Certificate, SCWS presented the direct and rebuttal testimony of Thomas B. Pickens, III, President and Chief Executive Officer of that Company. SCWS also subpoenaed two members of the Commission Staff to testify as rebuttal witnesses: Gary E. Walsh, Deputy Executive Director, and Charles A. Creech, an employee of the Commission's Utilities Department. Further, Mr. Kapp and Mr. Vitcavich testified on their own behalf. With regard to Sandy Springs, Chesley Milam presented and adopted as his own the pre-filed testimony and exhibits of Charles R. Gibson. William E. Chamblee presented and adopted as his own the pre-filed testimony and exhibits of Olin S. Kirkpatrick on behalf of Hammond, as did Steve Wilson with the pre-filed testimony and exhibit of C. David Elrod on behalf of West Anderson. Neither Duke, the Consumer Advocate, nor the Commission Staff presented testimony. Mr. James Bredenkamp appeared at the evidentiary hearing as a public witness.

APPLICABLE LAW

S.C. Code Ann. Reg. 103-704 (1976) provides in relevant part that "no existing public utility supplying water to the public... shall hereafter sell, acquire, begin construction or operation of any utility system, or of any extension thereof, without first obtaining from the Commission a certificate that the sale or acquisition is in the public interest..."

DISCUSSION AND FINDINGS OF FACT

The questions before the Commission in this case are whether the sale of the assets of Upstate Heater Utilities, Inc. to South Carolina Water and Sewer, L.L.C. is in the "public interest," and, therefore, whether the requisite certificate should be granted to South Carolina Water and Sewer, L.L.C. to operate the system, if the sale of assets is approved.

Numerous Upstate customers appeared before the Commission and offered testimony at the night hearing in Anderson, and at the evidentiary hearing held at the Commission's offices. These customers were strongly opposed to the sale to SCWS, and the granting of a certificate to that company. Not one customer spoke in favor of the transfer and/or granting of the new certificate. Two main problems, however, emerged from customer testimony. First, many people complained about the quality of the water, and, second, about the rate that they paid for it.

With regard to the quality of the water, we note that SCWS presented rebuttal testimony to the assertion of low quality through the testimony of two Commission Staff witnesses. SCWS attempted to make the point that even though a number of customers complained about the quality of the water at the hearings in this matter, the Commission's records do not show that very many of these complaints have been previously reported to this Commission. Charles Creech of the Commission's Utilities Department surveyed various customers earlier this year, and found few complaints of quality. Gary Walsh, Deputy Executive Director, reviewed the Commission's complaint files, and found six (6)

complaints since 1993, none of which were with regard to the quality of the water furnished by Upstate.

This evidence is certainly in conflict with the testimony of the Upstate customers. Upon examination of the evidence, we must conclude, however, that some Upstate customers are having water quality problems. Clearly, Staff witness Creech could not survey every single Upstate customer, and did, in fact, survey only a small sampling of customers. Of course, in his 1994 review of the various water systems done in preparation for the 1994 rate case in this matter, Creech's review of the various water systems showed "clear" samples. Creech, of course, was only able to sample each system on one particular occasion, so that his survey may not necessarily be indicative of the water quality seen by the public over an extended period. Second, although we have no reason to doubt the testimony of Staff member Gary Walsh, we do not believe that a lack of complaints at the Commission necessarily equates with a finding that water quality for all customers of Upstate is acceptable. We are therefore cognizant of the fact and believe that some of Upstate's customers apparently get water from time to time that is problematic in some way with regard to quality.

However, putting questions of water quality aside, the major issue with the public in this case, is that of the rates being paid for the water. The Commission's last actual approved rate for water was an \$8.75 monthly basic facilities charge per customer, with a monthly commodity charge of \$2.70 per 1000 gallons. Upstate, being dissatisfied with the Commission's decision, appealed the matter to the Circuit Court, and put its requested,

but unapproved, rates into effect under bond. These were a \$10.50 basic facilities charge and a \$3.15 per 1000 gallon monthly commodity charge, which are among the highest rates in South Carolina. The customers are still paying the latter amounts, as this case is still in litigation. During the rebuttal testimony of SCWS President Thomas Pickens, Pickens stated that, if the Commission approved the transfer and granted a certificate to SCWS, that Company would lower the rate to a \$9.50 monthly basic facilities charge, and a \$3.08 per 1000 gallon monthly commodity charge, which is a lower rate than is now being paid by Upstate's customers. Of course, it is notable that while this is certainly a lower rate than the customers are currently paying, it is still significantly above the last approved Commission rate. This lowered rate was not acceptable to customers present at the evidentiary hearing, according to their testimony.

Intervenor Chester Kapp provided significant testimony on rate matters during the hearings. Kapp proposed that, rather than having the Commission approve the transfer and award a certificate to SCWS, various other local water systems that serve areas adjacent to the present Upstate area should be allowed to attempt to purchase the Upstate system as a group. Kapp's research showed that, on a rate basis, that customers rates could be reduced 32% to 59% by such a purchase, versus the acquisition of the system by SCWS, which would result in essentially no rate decrease (as discussed above). Kapp presented his schedule CGK-1 (part of Hearing Exhibit 3) which compared bills for 5800 gallons, average rates per 1000 gallons, and various percentage decreases if another

local system supplied the water versus Upstate or SCWS. The differences in rates were significant. For example, a bill for 5800 gallons of water at the Upstate rate is \$24.41, while a bill from Broadway for the same gallons is \$16.60, for Starr-Iva \$15.85, for West Anderson \$13.93, for Hammond \$13.90, for Sandy Springs \$13.58, and for Duke \$10.10. (The latter figure was corrected by another witness to \$11.81, which was a correction accepted by Mr. Kapp.) The average rate for 1000 gallons of water was also significantly higher for the Upstate system, than for the other local systems (See Hearing Exhibit 3).

It is also significant that other local water companies are in actuality currently providing water to various portions of the Upstate system. The response to Consumer Advocate Interrogatory 2-1 (part of Hearing Exhibit 2) shows that Duke is the actual source of water for the Bellmead area, for Calhoun Acres, and for the Nevitt Forest/Leon Bolt areas. West Anderson provides water for Clearview and Surfside, whereas Hammond provides water for Dobbins Estates, Hill & Dale, Edgebrook, and Oakwood Estates. Thus, some of the other local water companies already furnish water to major portions of the Upstate Service area.

Three of the other local water companies presented testimony at the hearing. All three presented similar testimony. Sandy Springs, Hammond, and West Anderson all stated that they felt that they could best serve the subdivisions and residences located within their franchise areas, if indeed these portions of the Upstate system are to be sold, and the Commission does not approve the proposed transfer to SCWS. An exhibit was presented by Sandy

Springs which consisted of a Petition signed by various residents of the Calhoun Acres Subdivision asking that Sandy Springs be allowed to purchase the water system in their area, since it presently sold water to their "surrounding neighbors" at a much lower price than Upstate presently charges. See Hearing Exhibit 4. (Sandy Springs, Hammond, and West Anderson and the other local water systems, except for Duke, are all non-profit community-owned water companies and are not under the jurisdiction of this Commission.) The testimony of the local companies all stated that, although an impact fee would be assessed to each customer, the overall effect would be to provide the customers within each specified area with lower rates than are presently being paid to Upstate. Each of the three local water companies that presented testimony stated a belief that it was "fit, ready, willing, and able" to serve those areas or subdivisions that lie within their territories.

The evidence before us leads us to conclude that the public interest demands that we cannot issue a certificate that the proposed sale is in the public interest and decline to issue the requisite certificate to operate the system filed by SCWS. Further discussion follows.

#### CONCLUSIONS OF LAW

A review of the applicable law in the area supports our conclusion.

Property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When a Company devotes its property to a use in which

the public has an interest, it in effect grants to the public an interest in that use and must submit to being controlled by the public for the common good. Wisconsin Power and Light Company, v. Public Service Commission of Wisconsin, 148 Wis. 2d 881, 889, 437 N.W. 2d 888, 891 (1989). The public interest has been held to be a matter of policy to be determined by a Public Service Commission. Public Water Supply District v. Public Service Commission, 600 S.W. 2d 147, 155 (Missouri, 1980). See also Crescent Estates Water Company, Inc. v. Public Service Commission, 159 A.D. 2d 765, 551 N.Y.S. 2d 987 (1990). Further, the right to contract is not absolute; it is subject to the state's police powers, which may be exercised (by the Commission) for the protection of the public's health, safety, morals or general welfare. Also, transactions involving a public utility affect a public interest. Anchor Point v. Shoals Sewer Company and the Public Service Commission of South Carolina, 308 S.C. 422, 418 S.E. 2d 546 (1992).

As the applicant requesting approval of the proposed transfer, Upstate has the burden of proof to demonstrate that the transfer is "in the public interest". This burden has not been met, therefore, the Commission cannot issue a certificate that the sale is in the public interest.

In making this determination, the Commission has considered the interests of all parties to the transaction, and all of the testimony and evidence submitted in this case by all parties. Again, we believe that, on balance, the public interest in this case overwhelmingly demands that the Commission cannot issue a certificate that the proposed sale is in the public interest and

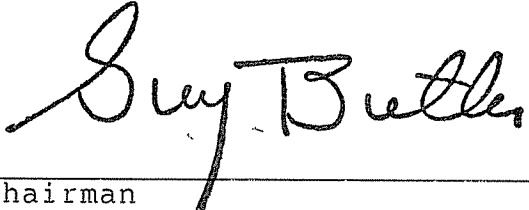
decline to issue the requisite certificate to operate the systems filed by SCWS. Clearly, the public in this case is overwhelmingly against the transfer.

IT IS THEREFORE ORDERED THAT:

1. The Commission cannot issue a certificate that the proposed sale is in the public interest as required by S. C. Code Ann. Reg. 103-704 (1976) and declines to issue the requisite certificate to operate the system filed by SCWS.

2. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
Chairman

ATTEST:

  
Deputy Executive Director

(SEAL)